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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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HANS MARKLAND,  
*Complainant,*

v.

JASPER COUNTY BOARD OF COMMISSIONERS,  
*Respondent.*

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Formal Complaint No.  
18-FC-110

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging that the Jasper County Board of Commissioners violated the Access to Public Records Act.<sup>1</sup> Attorney Eric J. Beaver filed an answer to the complaint on behalf of the Board. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

the Office of the Public Access Counselor on August 10, 2018<sup>2</sup>.

## **BACKGROUND**

This case involves a public records request for records associated with the Department of Justice (“DOJ”) audit of Jasper County.

Back in June, Markland filed a written public records request with Jasper County Commissioner Kendell Culp. Markland requested “all letters and communications with [the Department of Justice] for 2016, 2017, and 2018.”

Markland asserts that officials in the Jasper County Auditor’s Office informed him that the records he requested were being kept at office of Jasper County Attorney Eric J. Beaver; and thus, were not accessible. However, on July 2, 2018, the County Attorney responded to the Complainant stating that the responsive records were being compiled and would be available after the remittance of a fee. The response warned that some, but certainly not all, records may be confidential and withheld if they were determined to be non-disclosable.

The Jasper County Commissioners responded to the complaint by explaining that a DOJ grant program requires certain risk management protocols to safeguard the distribution of monies pursuant to a Sheriff’s forfeiture action. Defi-

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<sup>2</sup> A second complaint dated August 14, 2018 was received the week of August 20, 2018. The second complaint is substantially the same and contributed to the ultimate delay in the publishing of this Opinion.

ciencies in the risk management protocols – but not necessarily distributions – were found by the audit. Ultimately, the audit was cleared on May 22, 2018.

The County attorney argues that the County itself did not have any responsive documents. Instead, they were housed at his office as he was the point person tasked with working with the DOJ.

The County reiterates its position that the records contain disclosable and potentially non-disclosable materials and will be made available after being compiled and a cost estimate produced.

## ANALYSIS

### 1. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

Jasper County is a public agency for purposes of APRA; and therefore, is subject to the Act’s requirements. *See* Ind. Code § 5-14-3-2(q). Thus, unless an exception applies, any person has the right to inspect and copy the County’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal

statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## **2. Records Housed by a Third Party**

It is commonplace that a County tasks a contracted private attorney to respond to matters and be the custodian of certain materials germane to those matters. Counties are authorized by Indiana Code section 36-2-2-30 to hire or contract with private attorneys to advise them and carry out representative functions.

Nonetheless, a public agency may not enter into a contract that impairs the ability of the public to inspect those records. This includes the remittance or creation of records by and with an attorney. *See* Ind. Code § 5-14-3-3(g) and *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005).

Although alluded to in the formal complaint, this does not appear to be the case in the current instance. The complaint suggests the County is “hiding” materials by virtue of their physical locality in the attorney’s office but this is refuted by the County’s response. While records maintained by an attorney are still public records, this does not obviate the ability of the County to withhold records containing attorney work product or privileged communication.

### **3. DOJ Materials**

This Office is not well-versed in Department of Justice grants or the records generated by its audits. It stands to reason many – if not most – of those materials would be disclosable, however, as noted above, there are certain exemptions to disclosure the County may very well cite in its ultimate response. Hiring attorneys to respond to matters such as these are routine. Therefore confidential records (and attorney fees) are often the cost of doing business for public agencies.

Because the request itself was relatively imprecise in its wording, the County can decide what materials are responsive to the request and what may be superfluous or non-disclosable. It is my sincere hope that the County be as transparent and thorough as possible, but a tailored request always makes responses more efficient and timely.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Jasper County Board of Commissioners did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt  
Public Access Counselor